MINUTES

PLANNING COMMITTEE

January 23, 2013

A meeting of the Planning Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Councilmember Nadine K. Nakamura, Chair, at the Council Chambers, 4396 Rice Street, Suite 201, Līhu'e, Kaua'i, on Wednesday, January 23, 2013, at 9:38 a.m., after which the following members answered the call of the roll:

Honorable Tim Bynum
Honorable Ross Kagawa
Honorable Nadine K. Nakamura
Honorable Mel Rapozo
Honorable JoAnn A. Yukimura
Honorable Gary L. Hooser, Ex-Officio Member
Honorable Jay Furfaro, Ex-Officio Member

Bill No. 2439 A BILL FOR AN ORDINANCE AMENDING CHAPTER 8, KAUA'I COUNTY CODE 1987, AS AMENDED, RELATING TO THE COUNTY OF KAUA'I PLANNING DEPARTMENT CIVIL FINES **[This item was deferred.]**

Mr. Rapozo moved to approve Bill No. 2439, seconded by Mr. Bynum.

Ms. Nakamura: We are going to ask if anyone has comments on this Bill?

Ms. Yukimura: Could we suspend the rules and have Planning here?

Ms. Nakamura: Sure. We will suspend the rules and ask Mike Dahilig, Planning Director, to come forward.

There being no objections, the rules were suspended.

Ms. Yukimura: In looking at the proposed CZO amendment, it looks like the intention is to use the monies for enforcement basically either in hiring of persons or independent contractor to supplement the enforcement staff. It can also be used for materials supplies, and equipment that facilitate inspection, and enforcement of such violations, and that any fines collected in excess of one hundred thousand dollars ($100,000.00) would be transferred to the General Fund. So, what I am reading from here is that the Planning Department will be allowed to use up to one hundred thousand (100,000) to supplement its enforcement needs.

MICHAEL DAHILIG, Director of Planning: That is the way we understand the Bill as written.

Ms. Yukimura: Okay. Does that work for you?

Mr. Dahilig: I believe it is...when our Department provided input at the Commission level when this Zoning Amendment was proposed, we did support the intent of the Bill. We think that the ability to have those fines, if collected, as part of the Enforcement Program to go back into the Enforcement Program and help bolster it would certainly augment our already...we do have a pretty small operation when it comes to enforcement. So, this would definitely help augment those efforts.

Ms. Yukimura: And with all of the different amendments to the CZO, the need for enforcement increases, and it is meaningless to have these laws unless there is enforcement.

Mr. Dahilig: That is certainly a fair statement.

Ms. Yukimura: Okay. So, it appears up to one hundred thousand (100,000), the Council has no budgetary oversight except in the maximum number of persons that may be hired because it says, "the maximum number of persons that may be hired with these fines shall be determined by the Budget Ordinance." It gets complicated when you add in that you could hire independent contractors because that is not...I would guess...in the number of maximum persons hired.

Mr. Dahilig: Well, I guess the way we would read that is just like how we have our Sea Grant Consultant, as an independent contractor from our Department, yet we line item them in our Department. Certainly as part of the budget process, if there were funds that had been accrued in the new account that is created by the legislation we would be able to notify the Council that the intent is to actually go out for independent contract, like we would in the case for Sea Grant.

Ms. Yukimura: So, actually independent contractor refers to just a different way of retaining a person. In the case of Sea Grant...so the independent contractors do not come with their own desks and so forth? They come...or it does not matter?

Mr. Dahilig: I think it varies on the case. Certainly we look at the Sea Grant contract as a partnership where we do assist in providing space for the contractor. Yet at the same time, it is their funds that purchase the actual hardware and software that is needed to operate a full-time person here. So, it really is incumbent on how the contract is stylized when we go down that road and that is how I guess I would envision the phrase "independent contractor" be implemented.

Ms. Yukimura: Do you see that the maximum number of persons that will be hired includes independent contractors?

Mr. Dahilig: I guess the way...I would not read it as a maximum. I would read it as it is up to the Council as to how many warm bodies whether it be those that are paid out of revolving funds versus those paid by independent contractors, though that becomes the discretion of the Council at that point. So, I do not think there is necessarily a maximum that is a bright line, rather something that is left to Council discretion.

Ms. Yukimura: That is you are saying that if the Council feels we should have a mix of independent contractors and persons hired or employees, we would set the mix? Is that what you are saying?

Mr. Dahilig: At the end of the day it becomes full into the way we would read it as part of the Budget Ordinance or a Money Bill and certainly those specifics would have to be justified before this body.

Ms. Yukimura: Okay. Maybe I should ask the writer of the Bill what the intention was with the word "hired." Does it included independent contractors?

Mr. Rapozo: May I? The hiring included, obviously, employees or people on a fee contract. I am assuming that the intent was so they could go out and contract inspectors or investigators to enforce the code. The prerogative of the Department to choose what is best. I was assuming the contract. It is not really rocket science to go out and hire code violations or Inspectors. It was not intended to make it that complicated. We can remove the language and just have it say "contract" or...but independent contractors is basically professional services that we go out and hire an investigative firm. But I think, and this is just in my experience with this County, I think the easiest way would be to do eighty-nine (89) day contracts and have these guys come in and go out. It is quicker. It is cheaper. But that would be left up to the Department.

Ms. Yukimura: That is fine with me as a policy matter. We could try it and see how it works. But I guess, then maybe to clarify, we will just say the maximum number of persons that may be hired or retained because "hired" just implies employees, I believe.

Mr. Rapozo: We can remove that I do not have a problem with that. I think it does confuse the paragraph when you add in "maximum number of employees," because that infers we will hire County employees versus be able to contract out the services

Ms. Yukimura: I mean I think the question is whether we want to preclude them hiring, if they want to or if they feel like an employee is the appropriate way to go? I think the more flexibility, the better at this point. So, to just have them have the option of either an independent contractor or an employee. I would...I do not know...I guess that is one (1) of my fundamental questions. How much budgetary scrutiny is there going to be or should there be because I am remembering our Spouting Horn Fund, where there is no need on the part of the Department to come before the Council to show us and to get approval for how they are spending the monies? So the question here is how much budgetary oversight should there be and how much leeway should there be for the Department? Right now, it is just about bodies and that might work fine. But there might...and the good thing about this is that there is a limit on the amount of money that goes to the Department without a lot of oversight. In the case of the other fund it is unlimited.

Mr. Rapozo: The maximum number of employees will be determined by the number of fees or fines collected.

Ms. Yukimura: That is correct. There is a another limitation.

Mr. Rapozo: That is it. It is what it is. So, the scrutiny is there. But I would agree that it is confusing and I think we can probably fix that with some much clearer language.

Ms. Yukimura: Okay I will work with you on that then.

Mr. Hooser: Just a few follow-up questions. I am reading this a little differently than Councilmember Yukimura. I think they...and someone can help me. It says they are appropriated upon receipt. That means when it comes in, they can be spent immediately? So, I understand that. So, as the Department is finding people, the money comes in and goes into this account. The Department can then go out and spend that money regardless of any budget or what not. I understand that. But it looks like it is in addition to people. It is not just for positions. It is for material, supplies, and also equipment. So, there does not seem to be a limitation on that, interims that it could be automobiles or...and then, it looks like the one hundred thousand dollars ($100,000.00) is not really a ceiling because it says, "when the account has in excess of one hundred (100) of uncommitted funds." So, theoretically there could be...as long as you are spending it, there will never be in excess of one hundred thousand (100,000). So, it could, in fact just never go to the General Fund and always be spent whether it is one hundred thousand (100,000), two hundred thousand (200,000), three hundred thousand (300,000) without any budgetary oversight. So, I am wondering why the process would not be such that the Planning Department would budget this item and whether it is one hundred thousand (100,000) budget item in anticipation of the revenue coming in. Then it goes through the budget process and this is just a budgeted fund.

Mr. Dahilig: I guess the way we read this, when this phrase was inserted...

Mr. Hooser: A little bit louder.

Mr. Dahilig: Sorry, my apologies. There is an incentive to invest quickly and immediately. Certainly the fund is meant not to be accruing and growing larger and larger and larger. Rather it is meant to be for immediate investment. Certainly if more transparency is what is required, the Department is more than happy to follow through with whatever the Council believes is appropriate from a public transparency standpoint because at the end of the day, funds that come into the County are County funds. But that is the way we read this. Is that we are not supposed to be sitting on this like a bank account, accruing interest. It is meant to be pushed into investing as quickly as possible, expanding and creating a more robust program.

Mr. Hooser: So, I am assuming that you are anticipating a certain amount of revenue coming in the future and anticipating a certain amount of expenses. So, if this...you have so much income and therefore, you are going to spend it, so why not just budget that?

Mr. Dahilig: I think as we have started to implement this section of the Code, and you know, as we have shifted from a more criminal punitive kind of a I guess threat of enforcement to a dollar figure and civil fines figure. What we found in utilizing this portion of the Code so far is once you get to the very last chance, because by State Law we have to educate them, give them notice and give them time to comply first. But once you get to that final saying that you have ten

(10) days or else this fine will start accruing this day. We see immediate compliance from that point on. So, to date we have not collected any civil fines. That is maybe a testament to the large hammer that was put in place by the Council last time, when you said we are going to...I think in one (1) particular case we said we are going to fine you one thousand dollars ($1,000.00) a day if you do not comply within ten (10) days and they immediately complied. It is certainly an incentive for us. But from a predictability standpoint and a human behavior standpoint, we have seen that once the threat of fine is actually made they comply, which I think is a good thing. So, being able to project actual revenues and reflect that in an expenditure on an annual basis, I would say would be pretty difficult for us to anticipate given the unpredictability of the human behavior behind what happens when that fine is actually levied.

Mr. Rapozo: So, you said that we have collected zero (0) fines...any civil fines since the...

Mr. Dahilig: With respect to this section of the Code we have collected zero (0) fines. We have made...I have made determinations of levying of fines and we have seen compliance once that determination has been made and a citation letter has been issued. So, in essence it is been...the hammer has been working.

Mr. Rapozo: Well, I agree. But I think the violation occurs when...when there is a violation I guess, is it the County's policy to give them an opportunity to clear it up after the fact? So, we do not charge any fines, even though we have violations?

Mr. Dahilig: The difficulty is when we look at Chapter 46-1.5, Section 24 of the State Law, that is the enabling legislation that allows us to do these fines. State Law specifically prescribes an opportunity to comply and they use a phrase like that. I do not have it exactly in front of me. So, the opportunity to comply, we view as giving them our first seize and desist notice. We...once the seize and desist notice has been essentially ignored by the violator, then it gives us what we think enough cause to then trigger the second portion of what the State Code says which is the fine levying. We issue a second letter after the first cease and desist and we say that you have so many days to comply or else this fine will start levying on this date. Then we see them immediately comply after that. So, certainly I would personally like to be like a traffic ticket, where the violation happens you can levy the fine right away. But the education element is a policy of the State and that is why it is like that.

Mr. Rapozo: So the State Law prohibits us from charging a fine when we determine that a violation has occurred? Be careful, because I think our counterparts on the other islands do it differently.

Mr. Dahilig: I believe so. The way I understand it. It is the immediate levying of fines upon the discovery of violation, I think is what we are unable to levy at that point in time.

Mr. Rapozo: So, you are saying that we give them a notice of cease and desist, then we come back a second time and we give them another chance?

Mr. Dahilig: The we stylize it is we say, within seven (7) days or within ten (10) days this fine will start accruing. So, we essentially stylize it in that manner.

Mr. Rapozo: You are saying that every single violation that...every cease and desist notice that we sent out was corrected after that notice was given? I can tell you only because I have sent over numerous requests to your Department and you notice Mike, of violations. I have had to send reminders and you said, "yes a cease and desist notice has been sent out." I have...if no fines have been levied, then that would tell me that they are all in compliance and yet I know they are not. So, at what point...and we have not even issued a fine when will your Office levy a fine?

Mr. Dahilig: Well, we made attempts to levy fines and the way...

Mr. Rapozo: Well, okay you said earlier we have not collected, which infers that we never levied. So, you are saying that we levied fines and never collected? How do you...give me a typical case where a fine is levied.

Mr. Dahilig: What we have done in cases where we have identified a violation, we have sent what is procedural first our cease and desist notice informing the violator that there is a problem with the Zoning Code on the property and educate them as to how to fix. Most of the time there is an effort at that point already by many of these violators to come in and either get their as builts certified and approved by our Department or there are steps taken by them to work with Department to actually go through the Commission Permit Process. They vary. But when we look at actions to support compliance with the Law, then that is when we back off and say, "okay, you are making steps to comply with the Law." If that first cease and desist notice is ignored, then what we then do is follow-up with a letter saying, "you have made no attempts to comply with the Law, you appear to not have made contact with our Department. Therefore, we are going to start levying a fine starting on this date." So, it is a means of saying this is pretty much your last chance you, choose what you want to do and do it. If the issue, Councilmember, is that that is being too generous on our Department to give a certain time period before the fine starts, then certainly we can take a look at whether we levy it immediately. But we wanted to at least give a little bit of notice in advance of the fine starting to say, "you have ignored us, this is it. So get in line." That is what we have taken the approach as.

Mr. Rapozo: Well, I have seen that. The only reason that I bring this up is because I have seen that. Not only here on the Council, but when working at the Prosecutor's Office as an Investigator. I have seen the people ignore the first letter and second letter and yet no fine is levied. I mean why are we even wasting time on passing a Law. We are talking about one hundred thousand dollars ($100,000.00) ceiling and we will never get it. If you are not levying fines. I need to hear from you a commitment that we are going to go out and fine these people that violate the Code and not after threatening empty threats with letters. I mean, if in fact, we have this bold one thousand dollar ($1,000.00) a day or ten thousand dollars ($10,000.00) fine whatever it is, but we are not levying. We are not even utilizing...that is why the violations are rampant here on Kaua'i because they know nothing is going to happen. So I kind of want to hear a commitment from you as we move forward on this Bill, we have to have the commitment that you will start levying fines. Imagine if the Police Officer gives you a ticket and you go to

court and said, "you know, Judge, I stopped speeding or I am going to go out and here is my driver's license I got it since the ticket." Then the Judge says, "fine, all good." That is not how we do things.

Mr. Dahilig: Honestly, Councilmember, I agree with you in that sense where I would like to have that authority go to that point. But because the legislation draws upon authority of the specific provision in the State Law, education is intertwined into enforcement. As much as I would like to be more persistent and prudent with enforcement on an immediate basis, the philosophy of education and compliance is inherent in the civil fine legislation that was passed by the State.

Mr. Rapozo: Mike, I agree and that is fine. So, we give them a notice, a cease and desist. That second notice should come with a fine. You gave them an opportunity. That second notice should come with a fine.

Mr. Dahilig: Certainly, I can talk to my staff about...

Mr. Rapozo: Talk to your staff? You are the Department Head, Mike.

Mr. Dahilig: Well, I like to listen to what my staff members have in terms of input on how we enforce. So, I think what the thought is just to make sure that that provision of the Code is very clear and complied with by our Department, that if the fine is ever challenged down the line that I did not have enough ample notice or time to comply, that education check box is essentially checked off within the State Code.

Mr. Rapozo: What was the section, the H.R.S. you mentioned?

Mr. Dahilig: It is 46-1.5, Section 24.

Mr. Rapozo: Just one (1) more question, madam Chair. Last year, we appropriated monies to hire Inspectors or Investigators. Scott reminds me it was thirty thousand dollars ($30,000.00). Did we hire anybody?

Mr. Dahilig: We did not hire anybody. The funds are being used. But because it is an ongoing investigation that is going on with law enforcement, right now, those funds are being utilized in that manner. I am more than happy to talk with you about that off camera versus in public. But it is an ongoing investigation.

Mr. Rapozo: The monies were specifically allocated for a contract?

Mr. Dahilig: TVR enforcement.

Mr. Rapozo: For contract personnel.

Mr. Dahilig: The line item says TVR enforcement.

Mr. Rapozo: I understand that and you were here with the discussion. I think we agreed, this Council agreed that we were going to hire contract Investigators.

Mr. Dahilig: And without revealing too much in terms of what the program we are working with law enforcement on. We believe that we are in compliance with that intent of what you are stating. But without being able to divulge more on the floor without essentially reducing the element of surprise, I would rather not state that on the floor.

Mr. Furfaro: Excuse me, madam Chair, may I ask? Mike, to fulfill the request of Mr. Rapozo and the intent, if I scheduled an Executive Session for a briefing, are you prepared to cover that with us?

Mr. Dahilig: We would be more than happy to talk about our efforts in utilizing those funds.

Mr. Furfaro: I did not mean to interrupt. But Mr. Rapozo, would I plan to do that.

Ms. Nakamura: Councilmember Rapozo, you still have the floor.

Mr. Rapozo: I know what we discussed. I think we all understood what it was for. I guess we will wait to see what is in Executive Session. But these are the kinds of things that bother me when we have this kind of language now in this Bill that we are proposing. That regardless of what the intent of the Council was, you know, you guys will do what you want to do with it. I think that is troublesome and madam Chair, at this point I do not know if I am ready to support this thing. I know that it is my Bill. But I definitely want to work on the language so that we can actually put in some...I think Mr. Hooser's and Ms. Yukimura's concerns are well-taken. I do want to work on some language amendments because I do not like what I am hearing.

Ms. Nakamura: Alright. Councilmember Yukimura.

Ms. Yukimura: Mike, when there is a violation, I guess you have to sort of distinguish between the remedy or the direction from the Planning Department. So, in some cases you would say cease and desist and sometimes that would lead to an after-the-fact permit.

Mr. Dahilig: That is correct.

Ms. Yukimura: And sometimes that would lead to just a correction to make it according to plans or whatever?

Mr. Dahilig: That is correct.

Ms. Yukimura: Is there of a time where the fixture has to be removed?

Mr. Dahilig: There are certain cases where we have explained to...let me use a setback an as example.

Ms. Yukimura: Right.

Mr. Dahilig: We have had situations where additions to homes have been built in violation of setback requirements and we give them two (2) options. Either one (1), you can remove the structure or two (2), come to the Commission for a variance. So, most of the time what we do as part of that education process is that we explain to them what the variance process entails. Upon which point many choose to actually take down the structure to actually meet the setback requirement setback requirements is probably one (1) of the more cited sections of the Code that we see when it comes to violation notices.

Ms. Yukimura: If they choose to go through the variance situation then once they institute the variance there is no fines pending or do the fines...are the fines imposed while they are applying for a variance?

Mr. Dahilig: Usually because the opportunity to correct entails the ongoing process, there is no fine at that point.

Ms. Yukimura: Okay. What if the variance is denied?

Mr. Dahilig: Then they are left with one (1) option, which is to remove the structure or enter the phase of fines.

Ms. Yukimura: Has the variance ever been denied?

Mr. Dahilig: I do not know of a situation where we had a variance been an after-the-fact remedy in a situation like a setback.

Ms. Yukimura: I guess we have the H.R.S. 46-1.5, Section 24 right up there. It is hard to read. It is so many words. So, Ashley I think has the hard copy.

Mr. Rapozo: So, Mike 24(a) is the one (1) you referenced?

Mr. Dahilig: Yes.

Mr. Rapozo: It clearly says that we may...I am sorry... may impose civil fines for any violation of County Ordinances or rules after reasonable notice and requests to correct and cease the violation have been made upon the violator. So, that would be your first notice, right?

Mr. Dahilig: Yes.

Mr. Rapozo: There is nothing in there about education or anything like that. It says we are required to give them notice and a request to correct. So, based on the process you have talked about. Once we give them that notice, the cease and desist and they do not comply within the deadline, I would assume that we can levy the fine. They have a right to appeal under Chapter 91 and that is fine. But there is no requirement that we have to keep allowing the violator to prolong the process.

Mr. Dahilig: I hate to hang statutory interpretation on one (1) letter. But the concern we had is actually that phrase "requests" versus "request." So, there is a plurality..a plural intending there could be more than one

(1). That is where we kind of had to say, "here is the second request and then you will get fined after so many days." So, from a statutory construction standpoint, I know it sounds a little awkward. But that last "s" after "request" does gives us a bit of concern especially dealing with appeals under 91.

Mr. Rapozo: Okay. I guess we will follow-up with our sister Counties to find out how to get around this loop hole. I do not...it is what it is.

Ms. Yukimura: Now, it also says in 24(a) that any administratively imposed civil fine shall not be collected until after an opportunity for a hearing under Chapter 91. So, in terms of allocation of your resources, if you impose a fine, then you may have to have a hearing to collect it?

Mr. Dahilig: The way we have stylized our fine letters in consultation with the County Attorney's Office is that the notice of an appeal is...I am sorry the opportunity for an appeal is given as part of the actual letter that goes out levying the fine. Upon which time then we actually say that there is a confirmation process by the Planning Commission in the event that a fine is actually going to be collected. Then if fines still cannot be collected at that point, then the civil remedy for the Department is to seek an order from the District Court or Circuit Court depending on the size of the fine, to actually attach liens or do these types of things to actually pull in the revenue to the County.

Ms. Yukimura: Okay. So, when you say that a fine is imposed, then you give them a chance to appeal the decision within a time limit, is that right?

Mr. Dahilig: We say if you do not appeal within a certain amount of time to the Planning Commission as prescribed by the Planning Commission's rules, then the fine is deemed confirmed.

Ms. Yukimura: I see.

Mr. Dahilig: So, we give them that opportunity. The fine will accrue from the day...the fine accrual will continue. They have so many days under Commission rules to come in and say we are going to appeal or not appeal. If they do not appeal then the fine is fined.

Ms. Yukimura: But if they do appeal, then they are given a hearing?

Mr. Dahilig: Yes, they are.

Ms. Yukimura: So that satisfies that requirement of a hearing before collection?

Mr. Dahilig: Yes.

Ms. Yukimura: I see. Okay. Right now it seems like it is very unlikely that the fines will accumulate based on the process that you are working on. I do have a concern that in another situation, the Planning Department, because it wants money that it will influence their enforcement and find actions for reasons not actually valid. There is somewhat of a conflict of

interest that you would...it is like our Police are being accused of giving tickets just so the County can have more money because people do not know that we do not get the money anyway. But you know, where the ability to raise funds is also in the hands of the finer or the person who has the fines. I mean, you can see this dynamic. Right now, that is not likely, since you guys are so strapped and you have quite a due process procedure which I guess is...shows the value...one (1) of the values that it deters quick, unjustified fines. Do you have any comments about that?

Mr. Dahilig: I would not be truthful if I did not say before the Council that it is not an incentive for the Department operations because given what is the current fiscal state of the County and the amount of staff that I have to enforce. Certainly taking the odds on what a fine levy will actually yield in terms of cash is maybe something that if something like this does pass, a paradigm shift that may need to be instituted with my inspectors. We have to have that discussion. So, I would not want to say carte blanche, absolutely not. But the carrot and stick is certainly here with respect to expanding enforcement. I know a lot of concerns in the past and presently are with being able to shift to more proactive enforcement versus complaint-based. It is something that we struggled with. I think to have that discussion with the staff in terms of how be approach this is the legislation were to pass, certainly would also have to be looked at from a carrot and stick context.

Mr. Furfaro: I just want to check on your interpretation of the Item 24. 24(a)...the notice is singular. It is a reflective pronoun here. There can be several requests. But there is only one (1) notice. Notice is singular here, Mike. That might be interpreted as Waianae grammar. But that is how I learned it from Mrs. Torii. There is only one (1) notice. But there may be several requests in there so, I would like the Department to go back and revisit what you just explained to me that "request" was plural. No. But "notice" was singular and that is what we are reflecting on here.

Mr. Dahilig: I understand. It is a discussion from...that I know sounds trivial. But when we get to a point of defensibility, if we were ever to be put in a Chapter 91 situation, what we are concerned about is if the finders of fact did not believe there was enough notice given and that is what caused us a little bit of concern and why we came up with the hybrid second notice versus the immediate fine. We can take a look at it again and consult with the Attorneys Office on it. But...

Mr. Furfaro: There is another thing they teach you in Waianae. When the notice is one (1), bradah, chance 'em. Put some bite in this thing. You could have several requests, but it is one (1) notice. That is my interpretation.

Ms. Nakamura: Mike, I have a question. The way the language is written, I am looking at page 2 Section (E), I wanted to find out is...the intent is that you want to be able to use the funds to hire an independent contractor whatever way you want, but an independent contractor. And to be able to use the funds for materials, supplies and equipment that will facilitate inspection and enforcement of these violations. But for the hiring of a new employee with the use of the funds, you are okay with that...that should be part of the Budget Ordinance because it is not just the employee. But it is fringe benefits and looking at the big

picture of what is happening within the County finances. Is that clear in your mind the differentiation we are making here?

Mr. Dahilig: I think what has been traditionally the practice that you put a warm body that is going to be Civil Service in nature that it requires the blessing of the body.

Ms. Nakamura: But if it is independent contractor, you have flexibility under this rule...on this bill?

Mr. Dahilig: I think the way you read it now if we were to look at, let us say hiring undercover agents, we would still have to come back.

Ms. Nakamura: To put it in your budget?

Mr. Dahilig: Yes, that is part of an earmark for expenditure based on that phrase "independent contractor."

Ms. Nakamura: So, you are saying independent contractor and the employee must go...what about the other...the materials, supplies and equipment?

Mr. Dahilig: We would say that would not part of that. I think it is based on the bridge line between the persons and the materials and you have the one (1) phrase that says "persons." That is where I think where it could cause us a little bit of ambiguity in terms of what "independent contractor" means considering it was part of the list given in the sentence before.

Ms. Nakamura: Can we just say that the hiring of a new employee and/or independent contractor shall be determined with the use of these funds shall be determined by the Budget Ordinance, period (.) and then keep the rest of the same and make some...delete some portions up above?

Mr. Dahilig: Yes.

Ms. Nakamura: I think if that meets with your agreement, you know, I am happy to give this language to staff to prepare an amendment. If anyone has any concerns about that. Yes, Councilmember Yukimura?

Ms. Yukimura: It seems to me that we could allow Planning to hire an independent contractor because it is a one (1) shot deal. It is not an ongoing, you know, like an employee is. So, you could use the monies if we are still going to say deemed appropriate upon receipt. You can still use the monies in that year to do these pretty defined jobs. But I think the "employee" is a real problem because it anticipates the need for ongoing funding and this fund is not going to provide that. So, I am thinking it might be useful to have the flexibility to go with an independent contractor as long as you have the funds to do it with. But I would just take out "employees" entirely, and that whenever you need employees for enforcement or other needs of your Department, you would come in as part of the budget process because that needs an ongoing source of funding.

Ms. Nakamura: So, you are okay just trying to understand, that you are okay putting the "independent contractor" portion as part of the

flexible use of the funds without having to come to the Council. But the new employee should be part of the Budget Ordinance?

Ms. Yukimura: Yes. I still have this concern about the potential conflict of interest. But if we are just looking at workability of that fund and some flexibility to the Planning Department to be able to move quickly on certain enforcement issues...

Ms. Nakamura: And I believe, if I am not mistaken, this was patterned after the Building Permit Fund, or some other?

Mr. Furfaro: Excuse me, it does not mirror. It does not mirror the Building Permit Provision.

Ms. Nakamura: Okay. Thank you for correcting me.

Mr. Hooser: Yes, I just had some further discussion on the same point. The independent contractor could very well replace an employee and be renewed year after year after year, I would think. I do not know if there is any procurement or anything like that. So, I am still a little uncertain about that provision.

Ms. Yukimura: I agree. It may be that we are really talking about contract for services, as Councilmember Rapozo was talking about where you actually contract with a firm for a defined job rather than hiring a warm body which is what is implied by "independent contractor." So, it may be and Mel maybe you need to chime in on this, but the...maybe what we are thinking about is contracting for services instead of an independent contractor.

Mr. Rapozo: They would not be able to create a position anyway regardless of how much money they had in the fund until they came to Council. So, it is not a carte blanche. It is not. They cannot do it. They cannot...well we got the money, go hire an employee. They cannot do it. I would agree whether you hire an employee, unless it is like a revolving fund employee where subject to available funds so the employee knows that hey, your position is only good as long as there are funds and they understand that. We are just trying to give them a tool. Again, after what I heard today, you know, it is not like they are in a big rush to hire investigators or inspectors. So, I am not really in a rush to pass this. I want to make sure that they have the tools and in return, I want a commitment, and I can tell you that I am not supporting any more thirty thousand dollars ($30,000.00) in next budget. But we need a commitment from them that in fact after the first notice...if we are going to hang this up on an "s" on notices we might as well defer the Bill until we get an opinion on what that really means. What I am saying is one hundred thousand dollars ($100,000.00), yes we under the current practice, we would not see one thousand dollars ($1,000.00). We are not fining anybody. But what I do not want is to see is that we start fining people, we are at potentially one hundred thousand dollars ($100,000.00) could be used somewhere else in the tight budget that we are going to be facing. So, I can understand this is my Bill. I introduced it and I thought I was providing a tool. But I want to make sure that the tool is going to be receptive by the Planning Department and that they will utilize the tool. I do not hear that right now. I am not convinced that is what the Planning Department wants to do. I do not understand. But until we start exercising our right to fine people, this is a moot point. We are talking about one hundred thousand dollars ($100,000.00) and my

gosh. We do not even have a dollar ($1.00) in fines. They have not fined anybody. That is incredible. So, I think we can fix up the language. I was just...I do not have a problem moving this to the end of the agenda, your Planning Committee. We can work on language for an amendment if you want to get it out. It is not priority for me at this point, simply because I do not think anything is going to be done with it. But I do believe we need to tighten it up. I think giving the Department the latitude, they can only do what the budget allows them to do. I agree with Mr. Hooser that in fact, this money needs to go into the fund and they budget out of that fund. They tell us what they want to do with that fund...with that monies. Obviously if the fines do not come in, then they cannot get it. They do not get it. So, they cannot get what they want. I think that needs to be clarified as well. So, I am okay to defer it. It is fine with me.

Ms. Yukimura: Given all of this discussion, I think it is clear we should just take out any reference to "employees" or "independent contractors." What came to mind was the Forfeiture Fund in the Police Department where they just come up for a one (1) time approval rather than in the form of a Bill. But they come and explain what they want to use the monies for and it is approved. I am thinking that might be rather than need two (2) readings and public hearing and that kind of thing. The way that we approve expenditures from the Police's Forfeiture Fund might be a good system to worth with, which means we still have control or our approval is necessary. But it is not an appropriation format of a pretty long drawn on Budget Bill. I am thinking we would defer this today, and work on it rather than try to rush the wording. But I think we have come a long ways in understanding both the needs of the Planning Department and the expectations of the Council. So, those are my thoughts.

Ms. Nakamura: I would like to just address the question to the Chair, about the question about whether the materials, supplies, equipment also must be included in the budget that we approve? That is just, I guess, a mechanical question.

Chair Furfaro: Well the mechanical questions are very clear as summarized. You have the Forfeiture Fund which is worded accordingly with the Police Department. So, anything that they are going to use in that fund, they have to describe the narrative and present it to us. That is one (1) way. This Bill does not mirror what is currently in the Building Fund description and quite frankly, I think we should review both since you are going to defer the Bill to find out what wording fits the best for you. I do have a problem with giving one hundred thousand dollars ($100,000.00) there and then leaving the door open for equipment and things of that nature. You know, I really think the intent here...the bite in our control is going to be the manpower to enforce. Whether that force is contracted services or employees that come on for eighty-nine (89) days and go out and do the work is what I think the intent here is to boost up inspection. Not to boost up FF&E, furniture, fixtures and equipment.

Ms. Nakamura: Thank you, for that feedback. So, based on that, there is a motion to defer, which will allow the writer of this...the introducer of this Bill to maybe make some adjustments. So, do you want to do it to a certain date?

Mr. Rapozo: We are going to have some discussion after you are done with Mike. I do not know if you going to bring it back to order and then we can have some discussion?

Ms. Nakamura: Why do we not come back to the regular meeting, come back to order. Thank you, Mike, for your feedback. Why do we not open it up for discussions. Councilmember Rapozo.

There being no objections, the meeting was called back to order, and proceeded as follows:

Mr. Rapozo: I am not sure. I think two (2) weeks should be sufficient. It is just a matter of...I think the Chair has a good suggestion that we look at the Building Fund. On my little notes for my closing comments I had the Asset Forfeiture KPD model because I think that is...and that would be in the form of a really...in a form of a proviso of the budget that would require...we have don't it before with other funds. I think that is the easiest way. You put the proviso in the budget which would require Council approval, prior to spending. I think that would be a good model. I believe that the intent, well, I know what the intent was, because it is my Bill, was really to give the Planning Department the opportunity to hire eighty-nine (89) day contract people. So, they could go out and enforce the Code. It would not take away from the existing manpower. It would be additional staff that was paid by the fund. That was the whole thing. But if we are not fining people then we are not going to have any money to fund these special positions. So, again, without a commitment from the Planning Department, and that is something that we in the next two (2) weeks and the staff could note a request to our sister Counties on how they get around the statute that we saw. I agree with the Chair. It is clear that it is one (1) notice. I think if we rely on the Planning Director's interpretation we would never be able to fine because there is no end to the notices or the requests. The one (1) notice but many requests. So, I do not think...I think we have the ability to...not the ability, but they have the ability to appeal under Chapter 91. That is a given. That is their due process. As the Chair said why have we not tried? What does it cost us to go to a hearing? If in fact, that statute is ...the interpretation is correct we need to change the statute. We need to go to the Legislature and get that law changed. But I completely disagree because I know the other Counties are fining violators. We read about it in the paper...Honolulu paper. So we know that it is happening. But for some reason we have created our own loop hole and prohibited us from fining violators. We have violations that have gone on and on and on and for the new Councilmembers, I can share you with the communications that I have had with the Planning Director on several violations that we have sent several reminders. I am shocked to hear that we have not fined them. So, I will take the two (2) weeks. We will go ahead and please submit your concerns. If you would like. I am not sure who the analyst is working on this one (1). Is it Scott? Let Scott know your concerns. We will have an amendment in two (2) weeks. Madam Chair, I appreciate the time.

Ms. Nakamura: Any further discussion? If not, can I get a motion? Yes, Councilmember Kagawa?

Mr. Kagawa: You know, I am obviously new to the Council. I want to trust in our Planning Department to do the right thing as we are in the process of going through the forms. We heard it loud and clear that trying to discourage or stop the abuse of our laws regarding TVRs etcetera. That was one (1) of the big problems. Councilman Rapozo, I remember said that we are going to hire investigators and get them out there and levy fines. If that is the only way to stop them and, I know we had a lot of applause for that. I know that it is not an easy problem to correct. But I hope that this is a first step and like I said, let us do it right. I can see the Planning Director's opinion in saying whether we can make this

hold up because it does say "notice and requests." "Requests" normally implies two (2) or more and he is just trying to, I think, do his job and make sure that it will hold up in court. But I do see one (1) notice. I think if I were a judge and I had a violator who complained that they only called me once. If you are wrong, you are wrong. I mean, I do not see how a judge would say you made one (1) request...they made one (1) request, so you are off the hook. But I do not know. Again, it is tough when language dictates something and we want to do something else. But I just want to state the fact that I am very concerned and I am hopeful that at least we can get some progress because to me, the only way to correct this island and get it on the right track is to treat everybody fairly. When people are abusing our laws, they need to be stopped. Mahalo.

Upon motion duly made by Mr. Bynum, seconded by Ms. Yukimura, and unanimously carried, Bill No. 2439 was deferred.

Ms. Nakamura: I am sorry, I did not ask for public testimony. I would like to rewind and ask would anyone from the public like to testify on this matter? Thank you, Chair for reminding me.

Bill No. 2461 A BILL FOR AN ORDINANCE TO AMEND CHAPTER 8, KAUA'I COUNTY CODE 1987, AS AMENDED, RELATING TO THE COMPREHENSIVE ZONING ORDINANCE *(Amendments to the Shoreline Setback Ordinance)* **[This item was deferred to February 20, 2013.]**

Mr. Rapozo moved to approve Bill No. 2461, seconded by Ms. Yukimura.

There being no objections, the rules were suspended.

Mr. Dahilig: We are pleased to be before you today to discuss Bill No. 2461 that was passed out of the Planning Commission and it relates to Shoreline Setback amendments. The presentation is a little lengthy, as you can tell by the packet that we are distributing. But I think it will hopefully give the Council some historical overview as well as some of the insight behind what is a very technical matter. Certainly hope...hopefully this presentation can help prompt further discussion on the proposed amendments. So, our presentation today will first start with the basics, which is what is a "setback" and we will give you background on the Fletcher Study. Then we will go into some discussion about the implementation issues that we have experienced so far with the current Ordinance, which is Ordinance No. 887 and then discuss our Departments philosophy behind the proposed changes. We will talk you through the procedural history of where this Bill has gone. In fact, there was a previous iteration of the Bill received by the Council before. Then we will go into the actual proposal and the evolution of the proposal. We will talk about the further comments that were received after the transmittal to the Council and then go into further recommendations that hopefully can be put on the floor for more discussion. Then we will summarize at the very end. So, what is a "setback?" We will go...we will hit three (3) points essentially which is the general definition of a setback, where the organic law for the setback, and then what is our current County process. So, generally a setback is nothing more than the minimum amount of space required between a lot line and a building line. Essentially this is a no build area. A famous case, it comes here from Kaua'i and this at Supreme Court in 2007. One (1) of the plaintiffs is behind us. It is certainly a definite standard that we are following with respect to what a setback is and what is the intent behind this law. Where this comes from is Charter 205 (a),

which is our Coastal Zone Management Law. Specifically, this Bill comes from authorization under part three (3), Chapter 205(a) which is the State Shoreline Program. What that does is essentially sets a no build line for structures and grading. So, it is not less than twenty (20) but no more than forty (40). It is currently at twenty (20) from the certified shoreline. That administration is set with the Office of Coastal Conservation Lands within the Department of Land and Natural Resources and the purview of that is specifically Sam Lemel. Then the line is actually drawn and approved by the Board of Land and Natural Resources. The Counties can go higher by law, but within the forty (40) that is set. That is where this legislation comes before you today. Just to give you graphic depiction of what it is. We have *mauka* and...

Ms. Nakamura: If anyone wants to have a conversation outside this room, please feel free.

Mr. Dahilig: So, we have *mauka* lands and *make kai*. This is your typical lot. I wish all lots were drawn in squares. But unfortunately we do not live in that world. But the certified shoreline is set by DLNR, OCCL and that is that line there. The setback, which is set by the County of Kaua'i as limited by the State, is drawn further inland. Essentially what it has created is this no build zone, which is our shoreline setback area. Our current County Code Program is that we make a first determination, which is, it is abutting the shoreline or is it not abutting the shoreline. But with five hundred (500) feet and needs higher scrutiny. So, that phrase five hundred (500) feet with anticipated impacts. So further determination is made then the OCCL process is triggered upon which time a second determination is made to set the line using the Draft 2007 Fletcher Study or lot depth formula in Ordinance 87. Then it is accepted by the Commission. So, just kind of as a flow chart we have drawn you essentially what the steps are under the current law in terms of how you get to the Commission acceptance. What we have...as part of the legislation is essentially we are going to be terming throughout our presentation it the Fletcher Study. When we talk about the Fletcher Study we are talking about the 2010 iteration of it. Just some background on Chip. Chip was actually my Professor when I was at the university when studied geophysics in undergraduate school. He is now actually the Associate Dean of SOAS which is one (1) of top Coastal Science Colleges in the nation now. He headed what is called the Coastal Geology Group. It is a group that studies essentially fields like coastal sedimentography, strategigraphy coordinart geology or carne systems and sea level studies. So, what the Council did is they actually commissioned a study back in 2005 to study shoreline erosion rates island wide. That draft study was delivered in 2007 and was integrated as part of turned into Ordinance 863 and its success in Ordinance 887. Then the final study was delivered in 2010 and that is the study you see integrated in the Bill today. Essentially Fletcher's intent behind this was to provide policymakers, you around the table and the Administration and the public, shoreline data to assist with construction in these areas, how to make decisions in the name of science. These are the areas that Chip studied. It is pretty comprehensive. Almost every shoreline around the island has been studied and what they delivered are these maps to us that show transects. Each of these transect divides up the beach and provides an erosion rate. What you see in an area like Hā'ena, for example, everything is read up-and-down the coast which means there is an annual retreat of the shoreline that Chip's group has identified. How they have identified this is actually an aerial...historical analysis of the geomorphology of the shoreline. What he did was create a process to identify where these shorelines have been historically and then feed it into this massive computer that has algorithms and they were able to figure out how to calculate these erosion

rates then essentially create these within these transects. This process that Chip has used is widely accepted by many of the academic community, including the United States Geological Survey. This process has been implemented by them and similar to the process that you see as parts of Maui's Shoreline Erosion Rate Study. So, this is something that is progressive at the same time nailed in science and been accepted widely. So, when Ordinance 887 was passed, and it was touted as one (1) of the most progressive shoreline setback laws in the Country, and that is something that the County should be pretty proud about because it does recognize that things need to be setback further from the shoreline. That study in a nutshell created the forty (40) foot minimum setback and then based on the size of the structure, you took the Fletcher erosion rate and then times that by seventy (70) or one hundred (100). Then it also had an optional lot depth table, and we will be referring to that throughout the presentation, that in the event that the Fletcher Study yielded...you actually have to run through both processes, the Fletcher Study or lot depth study. Then whatever yielded the larger setback rate is what will be applied by the Department. I am going to turn it over to Ka'aina since he is one (1) of my line guys who could probably give you more about depth applicability issues with Ordinance 887.

KA'AINA HULL, Planner: I will go over the application issues of the current Ordinance and the issues that have arisen in Department in applying this Ordinance. The beginning of the Ordinance states currently the article should be applied to all lands within the County of Kaua'i, State of Hawai'i that are either abutting the shoreline, which is (a) or (b) not abutting the shoreline, but within five hundred (500) feet of the shoreline and there is anticipated impact essentially. (b) we do not have so much of an issue with in applying the Ordinance. It is with (a), all lands abutting the shoreline which within a regulatory or zoning regulatory framework means all lots. This is in Hanalei Bay, I believe. You can see that first lot abutting the shoreline with what looks like a parking lot or at least cars parked. Now I think the intent of the Ordinance was looking at improvements made on a lot as presented here. I think the Department would agree in essence that any structure or improvement proposed to be placed on that lot could either be affected by the coastal erosion processes or effect the process itself and therefore you would want to go and make that...you should go through the certified shoreline process. But when looking at the island as a whole and real-life issues that we have to deal with, while abutting the shoreline is intended to capture an area of concern for structures, it is actually imposing time and fiscal issues at the State, County and landowners. We have actually had discussion with DLNR where they are saying you are applying it too much. More often than not, it requires structures or activities that will clearly will either affect coastal erosion processes or be effected by coastal erosion processes. The case in point is this property here. It is a Grove Farm property on the south shore. That is one (1) single lot that you are looking at. It has a shoreline area here. We looked at it a few years ago, about a year and a half ago. Improvements to be made in the Kōloa Mill area located on that lot which is approximately 1.5 miles from the shoreline. So, improvement anywhere from a fence, to a hotel, to whatever is going to require a certified shoreline of 1.5 miles of coastline to determine that a structure 1.7 miles away from the shoreline is in fact outside of the shoreline setback area, out of the current Ordinance. This applies to large scale lots. If you think about Grove Farm has a fair amount. A&B, GNR..these area large scale lots which improvements being proposed on them and they can be drastically outside of the shoreline setback area are required to go through the certification process. The second issue that we have with the applicability section is all lands, which essentially encompasses all structures, all improvements, and all activities. A matter of fact, through the current Ordinance

you have the term structures and activities peppered throughout. To go back to Mike's original slide of what is a setback. It is a no build zone where improvements are required to be located outside. It is a standard zoning regulatory mechanism in which improvements are prohibited essentially. So, all structures...the Department is in agreement that this Ordinance should be applied to all structures. Structures located within a vicinity of a shoreline can either affect or be affected by coastal erosion processes and should be applied as such. This also holds with all improvements such as outside of the definition of "structures," you are looking at grading or landscaping which potentially the widening of a river mouth, or additional grass lands or what not, can potentially affect coastal erosion processes or be affected on by coastal erosion processes. Where we have issue is with "all activities" which within zoning is land use, which we do in fact, regulate much of our duties are concerned with land use regulation. So, when you need to understand here is all activities, that term, as it is used throughout this Bill or throughout the Ordinance as its exists applies from everything to a surf school to a weekend family picnic. Anything from electrical power generation to pole fishing from the shoreline. If a person is fishing on areas of land that are within the County's jurisdiction, which essentially could be commercial lands residential lands, open space lands, agricultural lands, if they want to set up a pole to go fishing technically under this Ordinance because it is an activity, they need to do a certified shoreline. That may senile a bit absurd and quite frankly it is, but we are required under this Ordinance to mandate that. Mike is going to go into a little bit more about the term "activities" and land use within the 205(a) framework.

Mr. Dahilig: As I alluded to earlier in the presentation, the organic...the authorizing Law in the State, state H.R.S. is part 3. Just to give a distinction between what is the difference between part 2 and part 3. Part 2 is actually the SMA program which we are all familiar with. Then part 3 is the shoreline setback. So there are two (2) programs that have two (2) different goals essentially in terms of what they are trying to regulate. So, just as list in a nutshell, these are all the requirements that the part 2 legislation, I guess, authorizes and implements as part of coastal zone management. Then part 3 is the Shoreline Setback Law. So, there are essentially two (2) programs and these two (2) programs do overlap in some cases. But in many other cases they are separately administered. So, I want to give one (1) example and that is a single-family unit. Under the part 2 legislation, which is the SMA program, by State Law there is no SMA permit that is necessary if you are under seventy five hundred (7,500) square feet. But under the Shoreline Setback Ordinance, as authorized by part 3, it is required if you are abutting the shoreline. So I want to go back to this. There is an overlap in certain cases. But in many other cases there are also separate administration, where one (1) does not apply and the other does. So, there is clearly a mechanism to say these are meant as two (2) distinct processes that the State entertain while passing this legislation. So and actually what we are saying is review in part 2 legislation in 205(a) is meant to regulate activities and the part 3 legislation in 205(a) is meant to regulate the placement of where the structure is.

Ms. Nakamura: Mike, that is seven thousand five hundred (7500) square feet of land area?

Mr. Dahilig: Oh, no, that is the building footprint.

Ms. Nakamura: Building footprint.

Mr. Dahilig: Yes.

Ms. Nakamura: Thank you for clarifying.

Mr. Dahilig: So, when we look at the Department's philosophy, I think...when we were proposing the amendments we were grounded in principles. One (1) is we want improvements to be more focused versus something that is generally lot based. We have been very strong on being a proponent of science driving the policy, supporting the Fletcher Study that was commissioned by the County and trying to implement that essentially in a fair, equitable and uniform manner. So, that it is fair across the board. It is a very robust application of the science and that is what drives uniform policy across the County. It was an attempt to bolster the clarity between what is a 205(a) part 2 process and 205(a) part 3 process. Just some background in terms of what has happened with the Bill. As I mentioned earlier, there was a previous Bill on this that was received by the Council at my Department's request to take a look at comments that came back from Sea Grant previously and to actually work with Sea Grant and other stakeholders on trying to craft a Bill that essentially tries to bridge many of the concerns. In April 2012 we had a public hearing and then on May 8th, we had further discussion. Then the Commission deferred the Bill for further work with stakeholders. So, between May through November, Caren was generous enough to give her time to participate with us in some of the discussions on this. But we also had a discussion with Sea Grant and other individuals including Office of Coastal and Conservation Lands, etcetera, to try look at issues with the Bill and address them. In November 27th action was taken by the Commission and this is the Bill you see before you today. So let me take a moment to kind of run through the Department proposal. Our Department proposal essentially is supported by two (2) pillars. The first pillar is changes to applicability, and again, based on the philosophy that we have had is, look at it from an improvements based approach versus lot based approach. Then the second one (1) was again, a robust application of the Fletcher Study. Now when you look at the Bill, even though you see we are only talking about two (2) things, you see a number of edits that are riddled through the present form of Ordinance 887. The only analogy I can liken it to is a Rubix Cube. If we make one (1) adjustment here, there has to be things to align that adjusted in order to ensure clean implementation without loop holes. So that is why there is a number of changes that you see throughout the draft. But essentially they are grounded on those two (2) principles. So when we had...I just want to go over some public comments that we received. What drove our changes to the Bill, we had Caren testify at our Commission Meetings and when we looked at the minutes, she received on April 12th and May 8th and here...in a nutshell her concerns about what needed to be addressed in this legislation. They are certainly all valid. Then just when the Bill was actually passed at the November meeting there was no testimony that was received by the public before the public that day. Going back to the two (2) pillars, let me explain where the change is in the document are. So, the first one (1) under the current Ordinance is this block here, which is the applicability block. What we are proposing is substituting this process with this process and these two (2) blocks essentially, the structure and grading section, as well as what is going to be termed the scientific zone of concern replaces what is the old applicable section. So let me first go into structure and grading. We still maintain in the legislation that areas that are applicable...are areas that are within five hundred (500) feet of the shoreline. We apply the setback on physical improvements that can either affect or affect the coastal processes and we are looking at things like structures, grading, landscaping, keeping in mind that we are trying to delineate that distinction between the part 2 and the part 3 processes which involve more activities in the SMA. Then we go into the scientific zone of concern and change we propose is to actually have the Fletcher Study drive the

requirements for the DLNR and OCCL Shoreline certification. What we focused on instead is the relative location of the structure approximate to the shoreline. So, we apply the shoreline setback process and we create essentially a forty (40) plus one hundred (100) times the annual coastal erosion rate, plus sixty (60). So this is an area that we are terming the scientific zone of concern because we are taking the minimum setback, which is forty (40) feet, plus multiple of one hundred (100) times of the Fletcher Study. Then in discussions with Caren, what we realized is that there have been concerns about even variances in the way the shoreline has been surveyed and that has been termed in some cases as much a thirty (30) feet. So what we are saying is let us double that and let us create this area of higher scrutiny as forty (40) plus one hundred (100) times the rate, plus sixty (60). So, we are again mining it down to areas that we essentially are trying to say okay, you need more scrutiny because what you are proposing, where you are proposing it, needs more determination. So that is the first set of our changes. The second one (1) is when you go back to the original Ordinance, we are proposing changes to essentially this portion of the process currently, which is the table versus erosion process. As I mentioned earlier, currently we have a table that is set because of constitutional concerns and we have the Fletcher Study times a multiple of seventy (70) or one hundred (100) and then you take the greater. What we are proposing is replacing the study...I am sorry. Replacing the current process with what is now at the very end of the process. We calculate the line and send it to Commission acceptance. So consistent with our two (2) pillars of philosophy again, is that we are making this push to have as many setbacks calculated as possible, using the Fletcher Study data. The reason why we are doing this is because we think from an application standpoint as well as an enforcement standpoint, it essentially yields greater enforcement for us. I think part of the concern trying to communicate why is the line here? We have to go through a whole explanation of okay, here is the lot table. Here is how the lines were drawn. Here is what was calculated and then we compare it to the Fletcher Study and here is where. So, we are essentially trying to merge most of the setbacks to what is uniformly applied under the Fletcher Study. But we are cognizant of the fact that of course there are constitutional rights and that the formula may not yield a buildable space. So based on consultation with the Sea Grant Program, we believe that a minimum footprint multiplied of fifteen hundred (1,500) multiplied by the average lot depth and divided by seventy-five (75) would least yield that constitutional remedy in the event that somebody says you are not letting me use my lot. So that was done in consultation with the Sea Grant Consultants. Just to kind of... to kind of also go through it. So we are doing an application of the Fletcher Study. We are limiting the distinction in the size of structure so there was the distinction between seventy (70) and one hundred (100) and what we are saying is the new line calculation should be uniformly applied is essentially the erosion rate times one hundred (100) plus forty (40) feet. That is what in a nutshell the new line that we are proposing for the legislation be adopted as. Just some other changes beyond the two (2) pillars discussion that we have had. We are aligning the language in Chapter 27 to reflect...sorry, Article 27 to reflect the civil fines legislation.

Ms. Nakamura: Can you back up one (1)?

Mr. Dahilig: Sure thing.

Ms. Nakamura: Is that consistent with your previous slide? What happened to the sixty (60) additional buffer?

Mr. Dahilig: Let me go back. The forty (40) times one hundred (100) plus sixty (60) is actually at this process. If we identify that something is within that zone of concern, then that is when we kick it over to the OCCL process require the certified shoreline. But when we get to the certified shoreline and draw the setback line, we set it set at forty (40) plus one hundred (100) times this. So, we are saying essentially as a means to try to bridge when a certified shoreline is required, as evidenced by the graph that Ka'aina showed with the weird lot scenario like the Grove Farm lot that we saw, we are saying that we know the science. We know where something is going to be located. Let us see if this is within an area that really deserves more scrutiny by OCCL, as well as our Department and the Commission. I hope that clarifies the difference. Just in other notable changes that we did insert so we could acknowledge what they are. The first is the Civil Fines alignment. We are just trying to do some clean up here. We are also adjusting the expiration of the Shoreline Certification acceptability from six (6) months to a year. We have noticed that as part of the application process, we literally have had applicants running in and then trying to push, because the six (6) months is really just too short of a time. What we are also changing is an alignment of the phrase "repair" with the definitions in the County Flood Ordinance and required under FEMA regulations. Some of the confusion between applicants has been between what our Department looks at and then what the Department of Public Works Engineering Flood Office says is repair. So, what we want to do is, say because the Flood Ordinance hinges on a lot of fiscal day-to-day kinds of matters with respect to the Flood Insurance Program, etcetera, that we want to align with them so that there is at least some consistency there. Finally, we required that any new subdivisions have a minimum buildable area when they are drawn. The reason why we are doing this is because we can see situations that people try to jerry-mander odd shaped lots or small lots to try to maximize buildable area and then kick to the Constitutional, I guess, exception. So, we are requiring already, at that point, new subdivisions have to draw them in a manner that would not kick you to the Constitutional exception. Then just some...yes?

Ms. Yukimura: What is the minimum buildable area?

Mr. Hull: Right now we have it in Section...well the minimum buildable are is defined under the definitions, which is one thousand five hundred (1,500) square feet times seventy-five (75)...plus the lot area divided by seventy-five (75). But that was...that came straight from working with Sea Grant. But the subdivision section that Mike is referring to is that it be built to accommodate at least five thousand (5,000) square feet of buildable area. Of course they have...oh, sorry.

Ms. Nakamura: So, we are looking at page 6, of my version here. Page 6, Minimum Building Area, Buildable Footprint definition.

Ms. Yukimura: Where is the five thousand (5,000) square feet?

Mr. Hull: Sorry. Page 12.

Ms. Nakamura: The County Attorney can join the conversation, if you would like to sit up at the table. We may need your assistance.

IAN JUNG, Deputy County Attorney: I knew that was coming.

Ms. Nakamura: Subsection (e).

Mr. Hull: Correct. Yes.

Ms. Yukimura: There is no language saying "minimum buildable area."

Mr. Hull: No. So, not to confuse the discussion. But the minimum buildable area, the actual specific definition kicks in the Constitutional claims that should the proposed setback of one hundred (100) times the erosion rate plus forty (40), should that push them outside of ever being able to construct anything on their lot because you have a lot of lots subdivided prior to 1972 that are much smaller and cannot accommodate such an expansive shoreline setback. Therefore they could claim that Department is not allowing them to build under the Ordinance. If it pushes them into that bracket, then they go to the minimum buildable area. But to preempt that with future subdivisions, we are proposing that essentially lots be designed. First they have to do the Shoreline Setback Certification prior to subdivisions to determine where that setback are would be and that they can build at least five thousand (5,000) square feet behind that setback area.

Ms. Yukimura: So you are actually talking about minimum buildable footprint, which is defined on page 6, and it is distinct from minimum buildable area, which is five thousand (5,000) square feet. Is that correct?

Mr. Jung: I think for clarification point, there is a distinction between the two (2). But the idea for the subdivision requirement, it is all about the design of the lot. So, when you come in to design the lot, you want to make sure that the lot is deep enough and wide enough to accommodate for...now we are not just talking about shoreline setback but rear and side yard setbacks to accommodate for least five thousand (5,000) square feet of buildable area.

Ms. Yukimura: And that is why we have required and it is not pulled out of amendments, a setting the shoreline setback at time of General Plan and zoning. So that you would require the developers to create lots that way. I believe...is Ruby here? There are in the manual that was developed by Sea Grant and Dennis Wong, there are examples of how those lots are configured.

Mr. Hull: Just to be clear, Councilmember, where the requirement for zoning amendment, General Plan amendments was in the original Ordinance and the Department is not recommending that those be removed.

Ms. Yukimura: Okay. Then maybe...

Mr. Hull: I can attest to the fact that it has been point out that we are proposing the removal, but we are not recommending that they be removed, nor are they in the draft Ordinance.

Ms. Yukimura: I may have been reading a very convoluted Bill that came from the Planning Department that I would strikeout some I...it seemed like you were taking it out.

Mr. Hull: Just to be clear.

Mr. Jung: Just for clarification with the strike-throughs. I know that is not normal procedure in terms of identifying ramsier comments. But the Planning Commission does want strike-throughs. So that the Bill that comes from the Planning Commission, actually does have those strike-throughs because it is easier for them to identify. Then we worked with Council Services Staff to get rid of those when it gets over here, since you do not necessarily like that, but by rule follow the ramsier procedures.

Ms. Yukimura: Yes. It was very confusing and I guess my lesson was to never read the Bill that comes from the Planning Commission, but to read the Bill that is set forth by our Attorneys after working with you folks. Okay. I will hold my comments on the General Plan until later. But I still want to know that, where minimum buildable areas requires new subdivision to have minimum build able areas, that is...we are getting confused between minimum buildable footprint, right? They are two (2) different terms, right? So, I just want to be clear about that because I was not thinking that we would have lots that are one thousand five hundred (1,500) square feet.

Ms. Nakamura: Do you actually mean requiring new subdivisions to have minimum lot sizes?

Ms. Yukimura: Yes, I think so.

Ms. Nakamura: That is what your language here says?

Mr. Hull: As it is based on that five thousand (5,000) square foot print, correct.

Ms. Nakamura: Yes.

Mr. Dahilig: I think the interface between what drives the lot size and what we are trying to stay away from specific lot sizes, is essentially the actual Shoreline Setback line once that thing is first drawn. So, it is hard for us to apply a minimum lot size scenario because it is more dynamic based on the topography of the land, how they want to craft it, where the shoreline setback line is, these types of things. We were just trying to close a loop hole that we could see people coming in after the Ordinance was passed to create weird and small lots that essentially would kick to the Constitutional provision and puts things that are closer to the shoreline than they really need to be. It is certainly debatable how we want to adjust it and we are open to any suggestions on it. But I think that is the basis of our intent is to close that loop hole so that we are catching them a time of subdivision so they are not trying to juice the process in creating weird lots and benefiting from the constitutional protection.

Ms. Nakamura: I stand corrected. It is buildable area in each respective lot. So, you are looking at creating the buildable area, but do you not need a...in order to get to the five thousand (5,000) buildable area, what is the minimum lot size?

Mr. Hull: To clarify the Planning Director in what he is saying is that, you could have a lot that has a one (1) foot erosion rate fronting it. Therefore it is going to have a one hundred (100) foot setback, which that five thousand (5,000) square feet has to be built outside the one hundred (100) square

feet setback, one hundred forty (140) foot setback. Then you are going to have another lot that has zero (0) erosion rate, so it has a forty (40) foot setback. So you have different size lots, but they can both accommodate five thousand (5,000) square feet buildable area.

Ms. Nakamura: It is very complex. So, you kind of have to work backwards from the erosion rate.

Mr. Bynum: Not necessarily right now, but I would like to see this some examples of the application of this one thousand five hundred (1,500) square foot formula. Not necessarily right now, but I would like to see some examples.

Mr. Dahilig: Sure. This was a public process before we hit this point. So, we wanted to highlight the areas that we made adjustments based on what we received as either pre-consultation input as well as stuff that came in to the Commission. What we heard overall, is that we want these things farther back. So, that is why in a sense have chosen the one hundred (100) over seventy (70). We heard from developers, as well as people who look at how the Ordinance is being applied from a public scrutiny standpoint, that they would like a uniform process. Something that is clear to everybody, where that line is supposed to be. As I mentioned earlier, we are looking at a sixty (60) foot buffer...additional buffer within the zone of scientific zone of concern to compensate for those survey irregularities. Then we have also looked at landscaping irrigation systems and we are saying that has to be away from the shoreline. So, we inserted in the Law, forty (40) feet away. Then we have narrowed references to prohibit activities to indicate that we are talking about beach areas, just for clarity sake. These are things that are indicative of some of the things that we put in. It is not encompassing of everything and certainly not reflective of every single item of input that we have received. But these are things that we felt as a Department recommendation were appropriate to insert into the Bill. In summary, we are trying to bolster the idea that we are creating a no build zone and we want something that is uniform, that everybody knows and relies on the County Commission's Fletcher Study. Then we are trying to align these regulatory regimes with other Laws that are tied into this process. Then so we did have the transmittal, and so Councilmember Nakamura did share with us the further Sea Grant comments that came in, as well as we listened to public testimony at the public hearing, as well as at first reading. Here were some of the themes that we have heard and you know, these are the things that we have kind of taken away. Again, there are concerns with the purpose of the section of the Bill and so we certainly can have that discussion. That there was actually a request to scrap the Bill and start over again. That, I think is a fair assessment. We have testimony that is for and against the landscaping definition. We have disagreements on the multipliers for the age of structure. Then more recently I was before this body about a month ago regarding things at Wailua Beach path, and certainly it is an additional concern that we are cognizant of the respective things like sea level rise and episodic erosion. So, to kind of track you through, we took a look at the first set of Sea Grant comments, and we are going back a little bit to something that came in October before Commission. This was all the...they suggested all annual coastal erosion rates are subject to review and approval by qualified professional designated by the Planning Director. We certainly agree that these shoreline setback transects...sorry the shoreline erosion transects produced by UH should be updated on a periodic basis. But just to give the Council a little bit of...because as you are the appropriation body as well, this study that was commissioned cost four hundred fifty thousand dollars ($450,000.00)

back in 2005. Now it does not...we can cut it into pieces with them coming up with the algorithm and actually taking the shoreline photos, etcetera. But if we take into consideration inflationary factors and how this study came about, the County invested close to half a million dollars ($500,000.00) in 2005 for this information. So if there is a recommendation, we would recommend that this study be updated every ten (10) years. I think what is cyclically we were mirroring that off what is mandated about the General Plan, as a decade renewal. Then we received a copy of the Sea Grant comments that came in last week, concerning the draft Bill before you. We have actually identified five (5) items that they have concerned with. Additions to the shoreline setback calculations, establishing setbacks that ZA and GP, alternative studies, septic systems and repairs. Let me just briefly go through of these. When we looked at the additional language, we have concerns with the phase "low erosion rates, but with high variability." Now, I understand where this is coming in from because of the recent issues at Wailua Beach. I think the concern that we have is that we have no way of actually defining what this is at this point. As far as what we understand, there is no island wide quantification of what low erosion rates and high variability is. In the memorandum they do say, and Ruby does say, that they are working on something that could be essentially translated into numbers and locational numbers. But that study is still ongoing. What we are concerned about is that the phrase "low erosion rates and high variability," could again insert uncertainty into how this section will be applied. Again, we are looking foyer clarity. So, we have a proposal. We will talk about it later in the presentation about how we can hopefully bridge this concern that was arisen by the Wailua situation. The second one (1) is regarding seventy (70) versus one hundred (100). So, they still maintain that seventy (70) is an appropriate multiplier versus one hundred (100). The reason why that they are saying this, and we read their comments, we think that they are saying this because seventy (70) is more defensible than one hundred (100). But our concern is that the erosion rate multiplier may not be imposed on structures that are not wood frame and it would also create some concerns. I am sure many people know what this house is. But when we looked at some of the construction and photographs, what you see is wood-frame construction above the flood level and then you have cmu and steel posts as part of the construction. So, we are...we have mixed materials, not just wood frame. There is actually a conference on wood-frame housing durability and disaster issues. This was something that was presented in 2004. This particular survey took a survey of sixty-nine (69) nationwide units and these were the ones that said we have to demolish because of physical condition. You can see the distribution is pretty weighted towards this area of between seventy-five (75) and one hundred (100) years of age. But you have outliers that are within the one hundred (100) year...above the one hundred (100) year threshold. So why we recommended again, was based on the public concern about one hundred (100) years as a more conservative way of doing this because we are trying to capture everything. We are trying to go for an age distribution at the high-end, versus something in the mean. Now seventy (70) versus one hundred (100) is certainly a policy decision that is left for this Council. But just to explain our rationale, this is why we recommended one hundred (100), because we are trying to capture, as much as possible and go towards the far end. But if the only concern is going back to that picture that I showed of the house. Our Department would be concerned if were put in a situation to proposition building materials and say that you are in the range between seventy (70) and one hundred (100), because then we would have to quantify how much of the mass of the building is studs versus cmu, versus concrete, versus wood? So, we would recommend, if there was some desire to do that, please understand the logistical issues that would accompany that.

Mr. Bynum: Related to this issue, if these changes were made, would there be circumstances where in a particular lot that because we increased it to one hundred (100), then it goes back to the alternative, and we actually have a setback that is less than it would have been if we would have left it at seventy (70)?

Mr. Dahilig: I mean, there are going to be those outliers. Certainly, when we look at it from a Constitutional context, that could come into play in terms of the concern that I am hearing from you. But for the most part, what we are saying is that if we go full board, as much as possible with the data for the most part there will be this uniform applicability. So, there may...I cannot with a certainty tell you that there is not some odd shaped lot out there that could end up being less than what would be...it would be...I guess it would be less given the old process...sorry, more given the old process versus less with the current process. But we think with the safeguards that we have been trying to put in here, that mostly everything will be pushed to the greater process.

Mr. Bynum: Right, because on the face of it, you go with one hundred (100) years, you are going to have larger setbacks. But there may be circumstances where that is not the case, right? You have just confirmed that. It seems to me we could write language to address that, even those anomalies. Something along the lines of if your setback is in this...if you used a multiplier anywhere between seventy (70) and one hundred (100) that resulted in a larger setback, that would be the default. As opposed to having a smaller setback. Does that make sense? It is something that I would like to look at to see if there is language to address that concern and to deal with those. You defined them as "outliers." I could follow-up, how lots...how often would that happen? My guess is that would be a guesstimate right now.

Mr. Dahilig: It certainly would. Until we are put in the scenario, we can only project at this point what we think would not yield the concerned result that you are describing.

Mr. Bynum: Do you think there is language that we could be able to address those outliers?

Mr. Dahilig: It is certainly worth a try. I know that the desire at the day is to have these structures setback in an appropriate manner as to safeguard from the loss of beach and the damage of structures. We can certainly try.

Mr. Rapozo: How about whichever is greater?

Mr. Dahilig: We could certainly try that.

Mr. Rapozo: I think if you look at the purpose, whichever is greater completely ties right into what the purpose of Bill is. I think that would be one (1) possible solution as far as language without having to rewrite the whole Bill. But I think whichever is greater would definitely fulfill that concern.

Ms. Nakamura: Thank you. Let us follow-up on that.

Mr. Dahilig: Just to kind of dovetail that discussion, we wanted to have Ian maybe weigh in on this because there are some legal issues concerning this.

Mr. Jung: In reviewing Sea Grant's comments, one (1) of the issues that they raised was that it would become an arbitrary and capricious standard if we were to go strictly with the one hundred (100) year span. In looking at that, I think what Sea Grant neglected to take into account was what Mike projected on the screen, where a home like (inaudible) was built with these multiple type improvements where it is masonry stone as well as wood structure. If you look at arbitrary capricious standard, you have to take a look at in sort of a totality of the circumstances test. I have done five (5) contested cases now, where they have tried to appeal Mike's decision and that is always the standard, was his decision arbitrary and capricious. You have to take in all of the evidence. So, it is going to be on a case-by-case systems setup. I think the goal is to look at...this is the policy goal that he set out for the one hundred (100) versus using a bifurcated system of seventy (70) for five hundred thousand (500,000) square feet of structure and one hundred (100)...over five hundred (500)...five thousand (5,000) square feet. So, when you look at those two (2) proportions, it does not account for the type of structure. So that in and of itself could be arbitrary and capricious based on its own. But if you are looking at defensibility, I mean, this still is one (1) of the strongest Setback Laws in the United States in terms of shoreline infrastructure. But if you look at how the structure is being comprised and built, you would have the defensibilities mechanism to say, well the structure is split wood and concrete so technically it could survive beyond one hundred (100) years. Then we would have to pull in evidence to contest the case type hearing to challenge the type of application. So, if it is defensible I am sure the Chair's friends in Waianae would say chance 'em. But it is a policy call, which you can look at.

Mr. Bynum: I just want to follow-up on that discussion. Thank you because we had this discussion at the original Bill that that could also be argued as arbitrary and capricious, the current standard, correct? I saw Mike's chart that he put up there of the study saying that a majority of the homes that are demolished because of being too old was occurring in the seventy-six (76) to one hundred (100). So, to me that would argue that no, this still has a scientific basis, even if it was all wood construction.

Mr. Jung: Data is data. You can find a counter study to look at what the life span of wood structure would be that could say it is at one hundred (100) years versus seventy (70) years. So, it all depends on the facts you bring up and your evidence when you defend the case.

Mr. Bynum: Right. We had a lengthy discussion about the life of the structure and keeping this science based. Just speaking for myself, I do not see...I see the advantages of not having two (2) standards and both legal and Administrative difficulties that it could because it is not clear enough. My concern would be what I said earlier, that we do not change the standard and the results in a smaller setback. So, if we can address that, I would be very supportive of this change because I think you can make the legal argument. Like you said, we have a progressive shoreline, it is going to get challenged and you are there about giving us language that has us have the strongest position, right?

Mr. Dahilig: So, just to kind...this is a comment that Councilmember Yukimura alluded to earlier. But they also raised concerns about the ZA and GP applicability and just to assure the Council, that language is still there. We are not proposing to say that it is not required at ZA or GP. In fact, we are actually requiring it to be done at subdivision. So...

Ms. Yukimura: Question. Are you done?

Mr. Dahilig: Go ahead.

Ms. Yukimura: On page 12, the new Subsection (c), "No Zoning Amendment, General Amendment, Development Plan or subdivision any of which involves a lot of lots or a portion of a lot of lots that would be subjected to this Article in the event that a structure or landscaping is proposed on the respective lot or a portion therefore." You could have saved a lot of wording by saying it is abutting. Let us see, "without a hazardous estimate coastal erosion study and certified shoreline," but you take out a shoreline setback line. That is deleted from this requirement.

Mr. Jung: As Mike indicated in his PowerPoint, this is like a Rubix Cube, right? So, if you are taking a look at the following tag line, which that it is as established in accordance with Table 1 and Table 2. Now that there is no longer Table 1 and Table 2, so he is going with the one hundred (100) times the new erosion rate calculation, right? So, technically, they would still have to do a Certified Shoreline, right, and show where...and then the setback calculation would be subject to.

Ms. Yukimura: Well, why do you not just take out "established in accordance with this Article?" Because you are taking out that a shoreline setback line has to be established.

Mr. Jung: Well, it is through the reference of Table 1 and Table 2.

Ms. Yukimura: Well, we do not care about Tables 1 and 2, right? You are taking that out?

Mr. Jung: Right.

Ms. Yukimura: But you still want a shoreline setback line established. You do not want a Zoning Amendment, General Plan, Development Plan or subdivision to be approved without a setback line to be established.

Mr. Jung: Well, it is inherent in the process of how....

Ms. Yukimura: I do not think so. Where else does it say it shall be established?

Mr. Hull: Councilmember, I think I hear where you are coming from. Being that the Department is recommended a single formula to be applied to establish a shoreline setback, it can be assumed that it is inherent in the

process. But if you want clarifying language that would be, if established at the Commission acceptance of it, I do not think would be...

Ms. Yukimura: I do not see anywhere in this Law where it says that. This provision was put in place to make it really clear that you could not do a Zoning Amendment, General Plan Amendment, Development Plan or subdivision, without the establishment of a shoreline setback line.

Mr. Dahilig: That makes sense.

Ms. Nakamura: We can work on language to add that back.

Ms. Yukimura: Okay.

Mr. Rapozo: Just remove that reference to the table.

Ms. Yukimura: Or it might be in accordance with this Article to make clear. I do not know. But...

Ms. Nakamura: Why do we not...we will work with our Legal Counsel.

Ms. Yukimura: Yes, very good, thank you.

Ms. Nakamura: So, possibly in accordance with this Chapter or something similar just to get the intent.

Mr. Dahilig: Another Sea Grant comment that we looked at was the issue "alternatives." As Councilmember Yukimura referred to, as well as described in the study that Dennis Wang with Sea Grant has published a Coastal Hazards book. We concur with their recommendation that this actually be a guiding document when we are looking at variances because the General Policy elements that are outlined in what is taken into consideration for coastal protection really would help guide the Department when we have to go outside of the formula and look at cases that are unique or extreme to look at coordinates, I guess, alignment with the polices laid out by that document. We also, I guess, saw the comment concerning septic systems and we believe it had merit. It is a concern. So, what we are trying to do is we are clarifying the definition of "structures," to include those below-grade, just so that we are trying to address those septic concerns. Then just a broader sea level rise concerns, and I do not want to get too much into this without...I am not much of an expert this area, but at least from what I understand, and at least from our philosophy, sea level rise is real. I think I have been trained that way. I believe it is a real concern. But in terms of what we understand of the science right now. The best that science can do is predict sea level rise using a bathtub model. What the bathtub model does, it just says if it goes up by one (1) foot of topography, that is it. But in terms of how wave behavior or how geomorphology or how they these types of things would interact with the behavior of the ocean as it rises, it is hard to say exactly what areas will be inundated as a consequence of sea level rise. So, essentially, we want to make sure that the science has not caught up to the micro-scale data that is put forth in the Fletcher Study.

Ms. Nakamura: We are going to take a short break after you finish this slide.

Mr. Dahilig: So, this concern regarding how to integrate sea level rise into what the Fletcher Study is, is something that scientists are trying to catch up with. What we have done, is we have actually asked Sea Grant to come to us with an additional technical study as part of the General Plan Technical Study series to help us with more micro planning in areas and to compensate for the sea level rise.

Ms. Nakamura: With that we will take our...is it three (3) minute?

Mr. Rapozo: Ten (10).

Ms. Nakamura: Ten (10) minute caption break and we will continue the slideshow.

There being no objections, the Council recessed at 11:35 a.m.

There being no objections, the meeting was called back to order at 11:51 a.m., and proceeded as follows:

Mr. Dahilig: We do have some further recommendations based on some of these things that have come in. Again, we would suggest that the Council look at adding language to refer to the Coastal Hazard Mitigation book as the guiding document for variances. With respect to...this is again, I referred to it in the middle of presentation, about these concerns of areas of high variability or dynamic coastal environments. We are saying for those static, accreting or non-defined shorelines that setbacks should be an additional twenty (20) feet until a study can be completed. Then once that study is completed, which we hope Sea Grant through what they are doing on Maui, can maybe mirror for us that figure then becomes implemented by rule. We come up with a twenty (20) foot factor it that we are saying it was twenty (20) feet for storm, twenty (20) feet for high hazard, let us double the high hazard and let us say okay, let us go forty (40). So it becomes a total of sixty (60) feet now and in you have static, accreting and non-defined shoreline setbacks and anything else would be a variance. Again, this is, I guess, our suggestion as a means to try to bridge the quantitative regime that we have right now with respect to the Fletcher Study and a lot of the qualitative effects that are noticeable right now, but we would not be able to implement an island wide basis because we do not have the data or the figures to necessarily merry with something that is very robust in the number sense. So, we are suggesting some kind of compensation as a bridge and then have something be implemented by role once Sea Grant's studies can catch up to it.

Ms. Nakamura: And Mike, do you have definitions for static, accrediting and non-defined shorelines?

Mr. Dahilig: Static would be zero (0), accreting would be anything above zero (0), and then non-defined would be those areas that the Fletcher Study actually did not cover. I mean there are on a micro scale, if you look

at some of the transect maps there are certain areas that did not have any kind of shoreline data. Therefore there was no transect developed.

Ms. Nakamura: Would the definitions need to be included in the Ordinance?

Mr. Dahilig: That is a good question. We probably have to check on that. It was just a proposal we put up there.

Ms. Nakamura: That makes a lot of sense and if you...if we are going to move forward, if you could come up with the definitions, that would be helpful.

Mr. Dahilig: Certainly, we can do that. In a nutshell just to summarize, again, we are looking at this as a mono space between the lot line and the building line. Then we are trying to create a no build area, so that when the *make kai* boundary of the beach erodes and goes back, that public space is maintained and the public width of that beach is maintained, unless OCCL says something. The last one (1) is again, we are trying to focus on uniform with a science driven process so that my staff has an easy time to apply it, the public can easily interpret what is going on out there and there is no, I guess, games that are played with respect to how things are drawn or put on the map. That is it.

Ms. Nakamura: Thank you very much for that detailed presentation. Any questions for the Planning Department?

Ms. Yukimura: I just wanted to commend you for commissioning this additional General Plan Update Technical Study. I think that is very timely. Also, I liked the idea of referring to the Hawai'i Coastal Hazard Mitigation manual or book, because I think it is a very useful tool and will encourage our Commission in its decision making to be science based. So that is very good.

Mr. Dahilig: I just wanted to acknowledge Ruby Pap, who is in the audience. Ruby has been very supportive of a lot of things that we have asked her to help us develop. Sometimes we do not see eye-to-eye on things but she has been a very good technical and policy tool for us to be able to develop some of these recommendations. So, I just wanted to acknowledge her in the audience.

Mr. Furfaro: Thank you, Ruby very much. Well done.

Ms. Nakamura: Any further questions for the Planning Department? Otherwise, thank you. Oh, one (1) moment please.

Ms. Yukimura: Can you just over what you just said about static, accreting, and non-defined and the twenty (20) plus twenty (20) plus twenty (20)?

Mr. Dahilig: We have a mandatory forty (40) right now based on Ordinance.

Ms. Yukimura: I see.

Mr. Dahilig: And you know, the initial thought was okay, we are going to...in cases where we have static, accreting or non-defined shorelines, we would reset that to a zero (0) in the multiple so that that becomes just a standard forty (40). But, as we have seen in scenarios like Wailua Beach, even though something is accreting, it is highly dynamic and moves. When you look to place a structure in the context a more data driven process it becomes hard for us to overlay how to draw the shoreline when you have data that says something is accreting, yet you know that there is a broader potential for dynamic issues. Then we were looking at something that is more so applied on an island wide basis because right now we do not have the localized information for every single one (1) of these beaches across the island. So, when we looked at how the forty (40) foot is essentially dissected, twenty (20) feet for high hazard, twenty (20) feet for storm, we are saying let us double the high hazard because there is a recognition there is more variability and that safety should prevail. Now, it is just a proposal that we are trying to achieve in terms of an island wide basis. But certainly we do feel these types of issues of variability and dynamic ocean processes should be addressed somehow but we just...I guess, and Ruby has been trying to bring up that point is that these are concerns and we should address them. But it is that difficulty of again trying to merry numbers and formulas with something that is essentially undefined from a quantitative standpoint. This is something maybe a route to go through in terms of adding more buffer than just leaving it a zero (0).

Ms. Yukimura: I apologize for my momentary distraction. But, in a sense you are making the twenty (20) plus is a hazard...it is those episodic hazards incidents, right? That you are really...

Mr. Dahilig: Yes.

Ms. Yukimura: Okay. At least I understand your rationale. I had one (1) more question on that paragraph looking at Zoning Amendments, General Plan Amendments and Development Plan Amendments on page 12. I just realized, correct me if I am wrong, unless it says no zoning amendment, etcetera shall be approved without all of these studies or establishment of lines and then it says unless Zoning Amendment, General Plan Amendment, Development Plan Amendments or subdivisions are initiated by the County. That is in addition to the old Law, but it is not underlined.

Mr. Dahilig: I want to refer this to...to Jung, I guess.

Ms. Yukimura: Because I was looking at Ordinance 887 and I do not see it in there.

Mr. Jung: Do have a page number?

Ms. Yukimura: Page 8 on 887. It is two (2) paragraphs below the table. That is something that your Department is suggest...well...

Mr. Jung: Yes. You are right. You caught it. We apologize for that in drafting. But there were several different versions bouncing around when we had meetings with Caren and Sea Grant. Thank you, for catching that.

Ms. Yukimura: But it was in your...the version although it was no underlined, it was in the version that the Planning Commission passed?

Mr. Jung: We have to go back and look at the minutes just to make sure everything is tight on that. The idea was if there is a General Plan coming down and there is GP new designations, then why have to do a Certified Shoreline if the General Plan, along with the General Plan Ordinance. So, that was sort of the idea. If you guys do not want it...that is a big policy call you can tackle if you want if you want. But...

Ms. Yukimura: No, I can see how unwieldy it would be because...well let me see. General Plan amendments are still parcel by parcel, are they not, lot by lot? They still would be lot by lot?

Mr. Dahilig: The concern was more in the broader context. Maybe when it comes to the General Plan update it says essentially an amendment to the 2000 plan. So, for clarification's sake if to pass the full range of General Plan changes potentially, we would have to do a shoreline survey around the whole island. I think...

Ms. Yukimura: But you would only make General Plan amendments certain places.

Mr. Dahilig: I think that is the clarity that we are trying to insert in there. That if we do go through the General Plan update, we do not want to be told that you have to draw a line around the whole island, unless that is what we are referred to do.

Ms. Nakamura: I think you are referring to General Plan Land Use amendments.

Mr. Dahilig: In this one (1)? Okay.

Ms. Nakamura: Rather than the General Plan. We could clarify that

Ms. Yukimura: Well, okay. I want to remember that Nukoli'i was a General Plan Amendment that was part of the Līhu'e Development Plan. So, I do not know. Maybe it is different when you have a hotel versus a residential subdivision. But if the intention...the rationale behind requiring Zoning Amendment, General Plan Amendment, and Development Plan Amendment was so that it would inform the design of the subdivision lots. You know, the Coastal manual that you said, you recommended be referred to, this Hawai'i Coastal Hazard Mitigation book, it shows you how the subdivision lots can be configured if you know where the setback lines are and how that can influence and enhance the drawing of subdivision lines. If that is the rationale and we consider that legitimate rational, it should apply to individual lot amendments made through General Plan updates and Development Plan updates, theoretically. Because it is lot by lot. It is not one (1) line across the whole coastline, you know what he mean?

Mr. Dahilig: I guess that is in essence, the clarification we would need inserted in some way or another. We thought our fix was to say, if it is County initiated as it is in the Zoning Code when we initiate something like, let us

say an exemption from the one (1) time sub rule. Anything County sponsored is considered. So, we were just looking at that for a model for that context. But if this does not meet the satisfaction of the Council, certainly other mechanisms can be entertained. But I think the concern from our Departmental standpoint is that if we look at something as robust as an island wide General Plan update, that it is going to be adopted by amendment to the 2000 plan, the cost of having to go through a certified shoreline in many of these areas is going to be almost prohibitive in terms of adopting the plan. So, we would like that like that addressed.

Ms. Yukimura; Thank you for the clarification. I mean, this will need some thinking, I think. Some thought.

Mr. Dahilig: Certainly the other types of actions are in the package of meeting the shoreline setback scrutiny or not. That is a policy call, certainly.

Ms. Yukimura: Okay, but those words are, I believe without doubt additions. So we need to underline.

Ms. Nakamura: Thank you, for catching that. My goal is to try to get out of here by 12:30 and to defer this measure because there is a lot of discussion that need to take place to get to amendments that can be presented back to the Committee. So, what I would like to do is open it up for public hearing...public comment. Then hopefully, we can recess this Committee or adjourn this Committee at 12:30. If that is okay with everyone, we would like to ask if there is anyone who would like to provide public testimony at this time? No? We should have testimony submitted a number of people at the public hearing last week. We also have some written testimony that everyone should have copies of and if there is no...let us come back to our regular session and is there any further discussion?

There being no objection, the meeting was called back to order, and proceeded as follows:

Ms. Yukimura: I agree with a deferral. There is a lot of work to be done with this. But I want to thank the Planning Department for the presentation today which helped to clarify a lot of things. I think that it was very useful for the public too. I also want to thank Ruby Pap and Sea Grant for their testimony and their work on this which is very helpful. Of course, I want to thank Caren Diamond and Barbara Robeson for their input, which I know will continue through this process.

Ms. Nakamura: We will be carrying on the conversations and the constructive criticism we received about the Bill itself and have some more dialogue, and hopefully prepare amendments back to the Committee. I wanted to raise one (1) concern about the deferral because the next Committee Meeting is on February 5th and both members of Planning Department and County Attorney will not be on island. So, I would like to defer to our Committee Meeting on December 20th, that would give us...

Mr. Rapozo: February.

Ms. Nakamura: Excuse me, February 20th. That would give us some time to really work on some of these harder issues.

Upon motion duly made by Ms. Yukimura, seconded by Mr. Bynum, and unanimously carried, Bill No. 2461 was deferred to February 20, 2013.

There being no further business, the meeting was adjourned at 12:08 p.m.

Respectfully submitted,

Allison S. Arakaki
Council Services Assistant I

APPROVED at the Committee Meeting held on February 20, 2013:

NADINE K. NAKAMURA
Chair, Planning Committee